U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 16Jul2001

CASE NO.:2000-LHC-2035

OWCP NO.: 06-162344

IN THE MATTER OF

ROY W. PREWETT,
Claimant

v.

OIL RECOVERY, INC.,
Employer

HARTFORD ACCIDENT & INDEMNITY,
Carrier

APPEARANCES:

Jeffery N. Gale, Esq.
On behalf of Claimant

Richard W. Withers, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Roy W. Prewett (Claimant) against Oil Recovery, Inc. (Employer) and Hartford Accident & Indemnity (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the

Office of Administrative Law Judges for a formal hearing. The hearing was held on February 6 and April 9, 2001, in Mobile, Alabama.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called two witnesses, Dr. Edward Schnitzer (Schnitzer) and vocation expert, Bill Vinson (Vinson) and introduced 14 exhibits which were admitted including Claimant earnings records with Employer, Claimant's deposition and the deposition of Dr. Schnitzer along with medical records from Drs. Schnitzer, Robert L. White (White), Guy L. Rutledge (Rutledge), Thomas H. Taylor (Taylor), work capacity assessment from Healthsouth Rehabilitation Center, medical records from Springhill Memorial Hospital Rehabilitation Institute, (SMH) Pro Health Fitness and Rehabilitation (Pro Health), North Baldwin Hospital and Mobile Infirmary and a vocational report by Vinson.[1] Employer called vocational expert, Eric Anderson (Anderson) and introduced 9 exhibits many of which were duplicate records from SMH, Pro Health, Drs White, Schnitzer and Rutledge along with medical records from Drs. Eric C. Schiller (Schiller), W. Brent Faircloth (Faircloth) and records from Anderson and investigators employed by Mark II & Associates.[2]

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on June 23, 1994 while in the course and scope of his employment with Employer.

2. Employer was advised on the injury on June 23, 1994.[3]

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__ ; p.___.

[2] Where the record contains duplicate exhibits reference is generally made only to those which were first admitted into evidence.

[3] The transcript erroneously refers to Employer notification of injury on June 24, 1994 (Tr. 6).

3. An informal conference was held on April 20, 1999.

4. Claimant's average weekly wage at the time of the injury was $490.00 with a corresponding compensation rate of $356.68.

5. Employer/Carrier paid the following disability benefits:
temporary total disability benefits (TTD) from June 24,1994 to September 22, 1994 at $326.68 for a total of $4,246.84; temporary partial disability benefits (TPD) from September 23, 1994 to October 23, 1994 for a total of $252.15; TPD from November 21, 1994 to March 5, 1995 for a total of $818.76; TTD from March 17, 1995 to July 31, 1998 at the appropriate compensation rate of $356.68 for a total of $57,309.00 and permanent partial disability benefits (PPD) from August 1,1998 through January 25, 2001 at the compensation rate of $192.80 for a total of $24,127.00 Employer has paid all medical benefits.

6. Claimant has a whole body physical impairment rating of 10%.

7. The date of maximum medical improvement (MMI) is September 5, 1997.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant since reaching MMI on September 5, 1997 is entitled to permanent total disability benefits.

2. Extent of Claimant's loss of wage earning capacity.

3. Availability of suitable alternative employment (SAE).

4. Interest and Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology: Work History and Medical Treatment

Claimant is a 45 year old male born on December 27,1995 with an 11th grade formal

education followed by receipt of a GED followed by on the job training as a tankerman and laborer cleaning up chemical spills. (Tr, 14, 15, 59). Claimant reads on a 6th grade level with spelling and math skills at the 4th and 6th grade levels respectively. (Tr. 60).

Before being employed by Employer, Claimant worked at the following jobs: general laborer performing heavy unskilled construction work for Southern Mobile of Rayburn, Alabama from 1973 to 1974 consisting of the building various components of mobile homes; laminator performing medium, semi-skilled for Dental EZ of Bay Minette, Alabama from 1974 to 1978 consisting of cutting, sanding and construction dental office cabinets; laborer and chemical operator performing medium semi skilled work for Reichhold Chemicals from 1978 to 1988 consisting of blending and pumping chemicals, opening and closing of valves, light maintenance on packing pumps, monitoring gauges, general clean up and bagging and stacking of chemicals. On occasion, Claimant has also worked as a laborer digging and helping to construct housing foundations. (Tr. 20-43, 56-59).

In October,1989, Employer hired Claimant to work as a water treatment operator at its Mobile, Alabama water treatment plant. There Claimant was responsible for pumping fluids from trucks into shore tanks. In late 1991, after training and receiving a Coast Guard approved tankerman's ticket, Claimant was placed in charge of 4 to 5 water treatment employees and was responsible for receiving and discharging liquids to and from barges. This work involved heavy, semi- skilled labor with a full range of postural activities as Claimant lifted and carried hoses and pumps over barge decks. As a tankerman, Claimant was required to work up to 10 to 12 hours per day or 60 hours per week performing 80 to 85% of work while standing and making $9.00 per hour, $560.00 per week. (Tr. 44-54).

On the morning of June 23, 1994, Claimant was preparing to discharge fluids from a barge into tank trucks for transfer to a shore tank. As Claimant went to lift a corner of a drip pan which contained a pump, he injured his back. (Tr, 67, 68). Claimant was off work from June 24, 2994 to September 23, 1994 when he returned to light duty working as a storeroom helper picking up supplies at the post office, taking material to men on the job-site and maintaining store room records showing the person requesting and the nature of the materials received. Claimant continued doing this and other light duty work until March 16, 1995, when Employer ceased to offer Claimant additional light duty in apparent response to a complaint and accident report he filed after returning from a trip to Pensacola during which he aggravated his back condition while riding as a passenger in an eighteen wheeler. (Tr. 58, 59). While performing light duty Claimant made $9.00 per hour working 40 hours per week. (Tr. 73, 74). Claimant has not worked since the March, 1995 truck incident. (Tr. 64).

Claimant has a rather extensive record of conservative medical treatment starting initially with Dr. Thomas H. Taylor, who saw Claimant about 25 minutes after the June 23, 1995 injury and diagnosed lumbar muscle strain with a possible right sided disc problems. Dr.

Taylor recommended x-rays, heat therapy with use of Parafon and Lortabs. Claimant returned to Dr. Taylor on June 27, 1995, reporting improvement in back condition, but with continued leg discomfort. Dr. Taylor referred Claimant that same day to orthopedist, Dr. Guy Rutledge. (CX-11).

Dr. Rutledge saw Claimant on 11 separate occasions: June 27, 30, July 18, August 1, 22, October 3, November 14, 1994, and January 9, March 2 and March 17, 1995. Dr. Rutledge's notes indicated evidence of medial calf dysesthesia and diminished knee jerk with quadrdiceps weakness with minimal improvement. On September 16, 1994, pursuant to Dr. Rutledge's direction, Claimant underwent a lumbar MRI which revealed the following: lateral herniation of disc material into the inferior aspect of the foramen on the right at L3-4, slight bulging on the L4-5 disc, and slight loss of the normal signal intensity on the L3-4 disc. (CX-10 p. 16). [4] In September, 1994, Claimant with Dr. Rutledge's approval returned to light work for Employer where he remained until March 16, 1995 when Employer discontinued Claimant's light duty assignments. (CX-10, p. 3).

On March 17, 1995, Dr. Rutledge referred Claimant to neurosurgeon, Dr. Robert L. White for evaluation and possible surgical decompression. Dr. White saw Claimant on 16 occasions: April 12, 19, May 17, July 12, September 6, October 25, 1995 ; January 3, 17, 22,31, February 28, April 24, May 8, June 19, September 25, 1996; January 29, 1997. On the initial visit, Dr. White noted lumbar motion restrictions with the absence of a right patellar reflex, quadriceps weakness and a positive femoral stretch on the right and rendered a diagnostic impression of residuum of right L3-4 disc herniation. (CX-4, pp. 25, 26). During the course of this treatment, Dr. White recommended and Claimant underwent lumbar epidural steroid injections by Dr. Eric C. Shiller on two occasions: August 14 and December 6, 1995, but without apparent success. (EX-D , CX-4 pp. 17, 21, 22). Dr. White referred Claimant for a second opinion to neurosurgeon, Dr. W. Brent Faircloth, on January 26, 1996. Dr. Faircloth examined Claimant and noted the prior unsuccessful treatment, including pain medications muscle relaxants, and therapy finding evidence of radiculopathy primarily on the right of L4, but like Dr. White, recommended against surgery. (CX-4, pp. 38, 39).

From June through September 1996, Dr. White had Claimant undergo 20 physical therapy sessions at North Baldwin Hospital. (CX-12). These sessions were unsuccessful with Dr. White noting on Claimant's last visit of January 29, 1997, continuing problems with a right Lc-4 disc herniation and rating Claimant with a 5% permanent partial disability and referring

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[4] A subsequent MRI of October 20, 1995 found no appreciable change from the September 16, 1994 MRI. (CX-4, p.10). A myelogram performed on January 11, 1996, noted subtle finding along the right lateral margin of the thecal sac and right nerve root which could be associated with the right postero-lateral disc herniation. An EMG performed in either January or February, 1998, showed evidence of denervation consistent with radiculopathy at the right S1 level. (CX-5, p. 20).

Claimant to Dr. Edward M. Schnitzer for further evaluation and treatment. (CX-4, p.3).

Dr. Schnitzer saw Claimant on 24 occasions: February 5, April 9, 16, May 22, August 1, July 2, 7, 14, August 20, September 5, 19, October 3, 1997, January 30, February 12, April 1, June 15, November 11, December 9, 1998; March 6, May 13, 1999; March 6,September 22, October 20; 2000 and February 8, 2001. On the initial visit, Dr. Schnitzer took a history and noted Claimant's physical complaints which included pain in the central low back with occasional radiation into both legs ranging from 4 to 6 on a scale of 1-10. The pain was aggravated by standing, walking, lifting and bending with some relief achieved by a change of position. Dr. Schnitzer diagnosed Claimant with chronic low back pain with radicular features with Claimant's injury resulting in secondary gait abnormalities and muscle atrophy of the right gastrocnemius and recommended additional therapy, use of Clinoril and Soma, discontinued tobacco use and use of a lumbar support. (EX-C, pp. 33-36).

On February 12, 1997, Dr. Schnitzer referred Claimant to acquatic therapy at Pro Health Fitness and Rehabilitation Center where he attended 9 therapy sessions from March 27 to April 15, 1996, but with no success. (CX-13, 14; CX-4, pp. 8, 9; EX-C, pp. 29-32). As of the July 2, 1997 session, Dr. Schnitzer assessed Claimant with chronic low back pain/radicular type with weak right ankle dorsiflexors and either L-4 or L-5 radiculopathy which assessment generally continued throughout the treatment, despite having undergone a hypertonic saline Racz catheter neuroplasty on May 6, 1997 and use of a variety of medications. (CX-5, p 32; EX-C, pp. 47, 49, 50, 51, 55, 57 and D). On the last visit, Dr. Schnitzer noted that Claimant continued to have aching pain in the lumbar region with radiation down the right leg along with right leg weakness requiring use of an AFO, use of Ultram and Vioxx. At that time, Claimant was able to walk 10 to 30 minutes per day but was required because of persistent pain problems to alternate between sitting and standing throughout the day. (EX-C, p.38).

At the bottom of his February 8, 2001 progress note Dr. Schnitzer stated:

> On review of FCE, done on 12/6/00, the evaluation indicated Mr. Prewett's lifting abilities fell in the light duty category. I am in agreement with those restrictions as noted. Additionally, it was noted that he had limited ability to stand, or walk for more than 5-6 minutes, after which he needed to sit down because of worsening symptoms. At this time, I would amend the restrictions as follows: continue lifting limit and push/pull limit as before. In my opinion, Mr. Prewett could alternate sitting and standing throughout a workday but should be limited to standing or sitting 10 to 15 minutes per activity. As such Mr. Prewett could qualify for a desk type job which would allow him to stand up and walk around periodically throughout the day (as an example).

The functional capacity evaluation (FCE) referred to by Dr. Schnitzer was performed at SMH Rehabilitation Physical Therapy Department and showed Claimant able to lift up to 20 pounds 5% of an 8 hour day, push/pull 75 pounds 5% of an 8 hour day, carry 10 pounds for the same amount of time with all postural activities limited to 5% of an 8 hour day with sitting, walking and stair climbing limited to 33% of an 8 hour day. The FCE further stated, that assuming an 8 hour day with two 15 minutes breaks and ½ hour meal break, Claimant would be able to sit for one hour, stand for one hour, and walk for 1 hour with rest periods and could alternate sit/stand up to 2 hours with rest periods. The FCE found Claimant could work part but not full time. (EX-H, pp 10, 11).

In the past Claimant had undergone 3 other FCE or work capacity assessments, all of which were done at the direction of treating physicians. The first FCE was performed on June 6, 1995 at Heath South Rehabilitation Center and found him unable to perform his past work for Employer. (CX-6). The second FCE performed on February 5, 1996, showed work capacities in the light to medium range, but with reported limitations on sitting (30 minutes), standing (15 minutes), walking (15 minutes) and lifting (10 pounds).(CX-7). The third FCE performed by SMH Rehabilitation on August 26 and 27, 1997, found Claimant again unable to do his former job with an ability to perform light work. but with difficulties in squatting, stooping, kneeling, climbing and ambulating on uneven/elevated surfaces and complained of low back pain radiating into the right leg. (CX-8).

B. Claimant's Testimony

Claimant's testimony dealt with his education and past work experience for various companies, including Employer, and work limitations as a result of the June 23, 1994 injury. [5] Claimant testified that prior to his June 1994 injury, he had no back problems. (Tr. 56). However, since then, despite considerable conservative medical treatment he continues to have problems with his right leg where it will go numb and cause him to stumble as he plants his right foot. Because of this problem Claimant is required to wear a foot brace to prevent foot drop. Claimant can sit for only 30 minutes, stand and/or walk for 15 minutes because of severe back pain. Claimant can drive for about an hour with breaks, but was unable to ride to and from Pensacola without aggravating his back condition. (Tr. 57-59, 70). Because of back pain he can sleep only 4 hours per night in one to two hour intervals. During the day, his activities are limited primarily to sitting and watching TV, occasionally washing dishes or clothes with avoidance of fishing and hunting as he had done in the past. (Tr. 60, 71,72).

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[5] Claimant's work history and education are set forth in the section entitled "Chronology: Work History and Medical Treatment." Claimant has a GED but no training in sales, computer usage, or multi-line telephone systems. (Tr.18, 19).

Claimant testified that he continues to experience back pain having 3 or 4 good days at a level 4 or 5 out of 10 (1 being minimal and 10 being maximum pain), followed by 3 or 4 bad days with pain at a level 7 or 8 out of 10. (Tr.62, 69, 70). As a result of the back pain, Claimant is required to take one Vioxx and up to 3 Ultrams daily which in turn makes him drowsy and reduces his level of concentration. (Tr. 65, 66, 76).

On cross, Claimant admitted that he performed light duty for Employer between September 1994 and March 1995, working full time making $9.00 per hour. Concerning pain, Claimant testified that pain is always present and that he will experience sharp pain from his back to his leg when even attempting to lift a gallon of milk or simply walking or sitting and that as a result he has not looked for work since leaving Employer. Despite the pain, Claimant continues to do home exercises that he learned in physical therapy. In addition to medication, Claimant uses a heating pad and Tens Unit to relieve pain. (Tr. 90-95).

C. Testimony of Dr. Edward Schnitzer

Dr. Schnitzer's testimony dealt with his treatment of Claimant and assessment of physical limitations as a result of the June 1994 injury. [6] Treatment commenced on February 5, 1997 based upon a referral from Dr. White. During the initial visit, Claimant complained of severe low back pain radiating occasionally down both legs and aggravated by standing walking, lifting, and bending. Dr. Schnitzer's examination showed Claimant to have an antalgic gate, mild muscle atrophy in the right calf, decreased sharp versus dull discrimination in the mid-thigh and medial calf, and lumbar tenderness. (Tr.7-11). Dr. Schnitzer diagnosed triangular back-pain with radicular features which was consistent with the history of Claimant's accident. (Tr.12, 13).

Dr. Schnitzer described his treatment consisting of anti-inflammatory medicine and use of Soma, a muscle relaxant, plus the use of additional medications and physical therapy to alleviate pain and increase Claimant's strength and mobility including the use of foot orthosis splint. (Tr. 14). Dr. Schnitzer found Claimant at MMI on September 5, 1997 with the following restrictions: 15 pounds frequent lifting, no prolonged sitting or standing greater than10 to 15 minutes with alteration between such activities, no frequent bending, stooping, kneeling or crouching. In determining those restrictions, Dr. Schnitzer adopted the FCE of September 5, 1997. (Tr. 17, CX-8).

Dr. Schnitzer found Claimant physically unable to do his former job for Employer and

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[6] Dr. Schnitzer as well as vocational experts, Bill Vinson and Eric Anderson testified on April 9, 2001, the second day of the hearing.

assigned a 10 % rating based upon his physical examinations and electric diagnostic findings and FCE. (Tr. 18, 19). On January 23, 2001, Dr. Schnitzer modified those restrictions based upon a December 6, 2000 FCE to include infrequent lifting of 20 pounds with alternate sitting/standing every 10 to 15 minutes. (Tr.21-25). Dr. Schnitzer testified that Claimant would need continued use of pain medication and epidural injections. (Tr. 26).

Dr. Schnitzer then identified a physical capacity assessment he had completed on February 1, 2000, in which he limited Claimant to 6 hours sitting, 2 hours standing or walking in 8 hour day with occasional lifting of 21 to 25 pounds, occasional squatting, crawling and climbing and frequent bending and reaching with avoidance of unprotected heights and moderate restrictions on being around moving machinery and mild restrictions on driving. In that assessment, Dr. Schnitzer stated that pain was present to such a degree as to distract Claimant from the adequate performance of daily activities or work and that walking, standing, sitting, bending, stooping, or moving of extremities would likely increase pain to the point of significantly interfering with work. Dr. Schnitzer further stated, that Claimant needed to take unscheduled breaks every1 to 2 hours in 15 minute intervals with Claimant's impairment producing "good" and "bad" days requiring absence from work 2 days per month. (CX-5, pp. 1-5 . When questioned about this evaluation, Dr. Schnitzer without any apparent explanation, changed his evaluation saying Claimant could work an 8 hour notwithstanding his pain complaints if the other restrictions were followed. (Tr. 28).

Upon further questioning by Employer's Counsel, Dr. Schnitzer testified that Claimant needed to change standing and sitting positions every 20 to 30 minutes and had permanent restricions of lifting up to 20 pounds, push/pull 75 pounds. (Tr. 30, 31, EX-C p. 37). Dr. Schnitzer identified the following jobs, which were provided by vocational expert, Anderson, that Claimant could do: self service gasoline cashier, sales agent for Terminex,[7] electrical accessories assembler, telemarketer, gate guard, parking lot attendant, surveillance system monitor. (Tr. 31-35).[8] Dr. Schnitzer then testified that absent an attempt by Claimant at

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[7] Dr. Schnitzer approved the sales agent for Terminex only if Claimant did not have to crawl and do only occasional squatting and crouching. (Tr. 46). Dr. Schnitzer had also apparently approved additional jobs in May,1998, involving automobile sales person, department store clerk, if no climbing or frequent stooping, check cashier, hotel clerk, telemarketer, security guard if no excessive walking, surveillance system monitor. However, he was not questioned about these positions and no vocational expert testimony was offered to prove the existence and appropriateness of these jobs. (EX-C, pp. 66-76).

[8] Employer's counsel attempted to elicit additional jobs of sales agent for Pest Control Services and restaurant cashier for Dr. Schnitzer's approval, but was prevented from so doing, because these positions had not been provided to Claimant's counsel, until Dr. Schnitzer's testimony at trial. (Tr. 35-38).

returning to work, all estimates of his working potential were mere "best quess educated efforts". (Tr. 38). Dr. Schnitzer admitted that the jobs he approved were based solely upon the written description provided by Anderson and his medical opinion. (Tr. 40).

When questioned about his change of position from the February 1, 2000 evaluation and his subsequent reevaluation on February 8, 2001 which allowed Claimant to work a full time job subject to 20 pound lifting, 75 pounds push/pulling, 20 to 30 minutes sit/stand, Dr. Schnitzer was unable to provide any explanation other than to say Claimant admitted to him an ability to walk 15 to 30 minutes. (Tr. 41-44). Further, Dr. Schnitzer provided no explanation for his refusal to follow the latest FCE recommendations of December 6, 2000, which found Claimant unable to work a full-time job, but rather, limited to 1 hour sitting, 1 hour standing, and 1 hour walking or 2 hours alternating standing and walking with breaks in an 8 hour day. (EX-H, pp.10, 11). Admittedly, Dr. Schnitzer routinely follows FCEs when imposing restrictions. (CX-3, pp. 23-27).

D. Testimony of Vocational Experts, Bill Vinson and Eric Anderson

Claimant called vocational expert, Vinson, who testified about Claimant's academic and work background as noted above. Vinson testified that Claimant's job prospects were diminished by a lack of transferable skills, specialized training, pain levels that affect his ability to concentrate and be dependable, and need to take unscheduled 15 minute breaks every two hours. Indeed, Claimant would not be employable either if he was required to be absent 2 days per month or his pain level significantly distracted from his abililty to concentrate. (Tr. 68, 70). In Vinson's opinion, Claimant could not be expected to earn a decent living without additional training. (Tr. 71).

Concerning the positions identified and approved by Dr. Schnitzer, Vinson testfied as follows:

The surveillance system monitor position is inappropriate because it is sedentary in nature and under DOL standards this requires the ability to sit the majority of the day (6 out of 8 hours) which Claimant cannot do either pursuant to the latest FCE of December 6, 2000 or Dr. Schnitzer's February 14, 2000 assessment which allows Claimant the ability to take 15 unscheduled breaks every 1 to 2 hours and sit or stand at will. (Tr. 74, 75). The parking lot attendant position is inappropriate because it involves light work as do gate guard, assembler, sales agent and self service gasoline cashier. The telemarketer position requires the ability to sell for which Claimant has no experience and the ability to imput data into a computer which Claimant does not possess. Claimant likewise is not qualified to prepare pest control contracts having no prior knowledge or experience in this field and is not qualified for the cashier position having no familiarity with office equipment or typing.

(Tr.76-85).

Employer called vocational expert, Anderson, who testified that he was retained by Employer to do a vocational study and labor market survey relative to Claimant's employability. (Tr. 102). Anderson met with Claimant, obtained a medical or work history, administered some tests and concluded that Claimant was employable in the Mobile/Bay Minette area. (Tr. 103). Anderson testified that he went over the following positions (self service gasoline cashier, sales agent for Terminex, electrical assessory assembler, telemarketer, gate guard, parking lot attendant, and surveillance system monitor with Dr. Schnitzer and secured his approval. Anderson got information on these jobs from Dictionary of Occupational Titles(DOT) and then called the employers to confirm the information he had received from the DOT. According to Anderson, he gleaned the actual job requirements from the Employer and compared it with the restrictions imposed by Dr. Schnitzer in finding the jobs listed as appropriate. (Tr. 108-110). Anderson further testified that all of these jobs, except the assembler position at Dental Ez, probably existed around the mid to latter part of 1997 and then stated the availability of such jobs as of September 5, 1997 when Claimant reached MMI. (Tr. 117, 126).

On cross Anderson admitted not discussing Claimant's restrictions with any prospective employer, but allegedly, focusing on the essential job functions when talking with such Employers. (Tr. 114, 115). Anderson testified that all listed positions were available when contacted but, that if Claimant had to miss 2 days a month because of his condition it would adversely impact all jobs listed. (Tr. 132, 133). Anderson further admitted having no specific information or reports to confirm the existence of suitable jobs as of September 5, 1997, but based his testimony upon general experience in the area. When questioned more specifically about these jobs, Anderson admitted that the telemarketer job did not exist until the later part of 1997 or first part of 1998. (Tr. 126-129). Anderson further admitted having no information based upon Claimant's past work history to indicate as he suggested, on direct examination, a lack of motivation or desire to work. (Tr. 122).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he is entitled to permanent total disability (PTD) benefits presumably from September 5, 1997 when he reached MMI to the present and continuing based

upon an inability to perform his past relevant work or any other suitable employment[9]. Employer agrees that Claimant's injury precluded him from performing his past work for Employer, but contends that it established suitable alternative employment as early as September 5, 1997 and as such, Claimant cannot be awarded PTD benefits from that date forward because Claimant failed to make any effort to secure work as required under New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038 (5th Cir. 1981).

Employer argues that it established suitable alternative employment (SAE) through the testimony of treating physician, Dr. Schnitzer who established reasonable work restrictions on Claimant, and vocational expert, Anderson, who identified the following jobs which Dr. Schnitzer approved: self service gasoline cashier, sales agent for Terminex, electrical accessories assembler, telemarketer, gate guard, parking lot attendant, and surveillance systems monitor. Claimant on the other hand argues that none of the jobs were appropriate, because they fail to consider or take into account: (1) the limitations imposed by his pain; (2) the valid FCEs or Dr. Schnitzer's assessments prior to or following his latest assessment of February 8, 2001; and (3) Claimant's limited work history and educational background.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333(1953); J.B. Vozzolo, Inc., v. Britton, 377 F.2d 144(D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251(1994), *aff'g* 990 F.2d 730(3rd Cir. 1993).

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[9] In his brief Claimant's counsel argued for PTD benefits but did not specify when they should begin. It would nonetheless appear from Counsel's arguments that he seeks the earliest possible date for such benefits which would commence with Claimant's MMI of September 5, 1997.

In the present case, I was impressed with the testimony and sincerity of both Claimant and Vocational Expert, Vinson. Both witnesses testified in a straightforward and consistent manner. Claimant's testimony was moreover supported by multiple medical records confirming a back condition producing severe pain radiating into lower extremities. Claimant has continued to experience severe pain despite undergoing extensive conservative treatment including various pain medications, injections, therapies, exercises, heating pads and Tens Units. Vinson provided a detailed vocational analysis and stated valid reasons as noted below for finding the jobs listed by Anderson to be inappropriate.

On the other hand, I was not impressed by Dr. Schnitzer's testimony concerning Claimant's latest restrictions and ability to perform work listed by Anderson as SAE. Although a treating physician, Dr. Schnitzer provided no explanation for his failure to follow past and accepted practice of following FCE's in determining current work restrictions. While he certainly is entitled to change his opinion about Claimant's work limitations due to pain, such an opinion to carry any weight should have some objective basis. Other than Claimant's admission about being able to sit, stand or walk in 30 minute intervals, there is no evidence to suggest that Claimant's pain does not severely compromise his ability to work and limits him to at most 3 hours or part-time work as indicated on the most recent December, 2000, FCE. Moreover, Dr. Schnitzer approved jobs without possessing requisite information about job requirements having only a brief description of physical and work demands of such positions that in most cases did not address even the latest work restrictions he imposed on Claimant.

In like manner, I was not impressed by Anderson's testimony. Anderson failed to document in many cases how the jobs he listed complied with Dr. Schnitzer's work restrictions and exhibited a bias against Claimant suggesting on several occasions a lack of motivation to work without any objective basis other than a belief that Claimant's receipt of Social Security disability benefits encouraged him not to work. Anderson made no attempt when speaking with potential employers to inquire whether a person with Claimant's limitations could successfully obtain, perform, let alone retain such employment. His generalized testimony about inquiring into essential job functions did not answer the question about the appropriateness of such work for Claimant.

C. Nature and Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649(5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407(1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157(1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91(1989). Care v. Washington Metro Area Transit Authority, 21 BRBS 248(1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS(CRT)(2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148(1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56(1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, Leech v. Service Engineering Co., 15 BRBS 18(1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446(1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. Turner, 661 F.2d 1031,1038; P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30(5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444(5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89(1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261(188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1(CRT)(D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128(1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224(1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v.

Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679(1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that a claimant is reasonably capable of performing, are these jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, (SAE) the burden shifts back to a claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. Termed simply, the claimant must prove a diligent search and the willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248(1987). Moreover, if claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp., v. Director, OWCP, 748 F.2d 687, 18 BRBS 79(CRT)(5th Cir.), *cert. denied*, 479 U.S. 826(1986). If a claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64(1985). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. Elliot v. C & P Tel. Co., 16 BRBS 89,92(1984); Equitable Equip. Co., v. Hardy, 558 F.2d 1192 (5th Cir. 1977). Claimant's credible complaints of pain alone may be enough to meet this burden. Golden v. Eller & Co., 8 BRBS 846(1978), aff'd, 620 F.2d 71(5th Cir. 1980).

In this case there is no question that Claimant's June,1994, injury prevented him from performing his past work for Employer thus shifting the burden to Employer to show the existence of SAE. To do this Employer has to show jobs that can accommodate Claimant's restrictions. Claimant credibly testified that he can sit for about 30 minutes and stand or walk for 15 minutes, can drive for an hour with periodic breaks. Dr. Schnitzer testified and the December 6, 2000 FCE showed an ability to lift up to20 pounds 5% of an 8 hour day and 15 pounds 33% of an 8 hour day with most postural activities 5% of an 8 hour day. The December 6, 2000 FCE showed, moreover, an ability to sit 1 hour, stand 1 hour and alternate sit/stand 2 hours in an 8 hour day restricting Claimant to part time work. None of the jobs identified

by Anderson fit those restrictions.

Assuming arguendo that Dr. Schnitzer is correct in unexplainedly changing Claimant restrictions and permitting him to work an 8 hour day lifting up to 20 pounds, push/pulling 75 pounds ford 15 feet, sitting standing or walking up to 30 minutes with occasional (up to 1/3 of a day) postural activities (crouching, bending and stooping), I find that none of the jobs cited by Employer as SAE meet these criteria. The self service gasoline cashier is defined as light work requiring frequent standing (up to 2/3 of a day under DOT standards) and only occasional sitting which would not allow the necessary alteration from sitting to standing which Claimant's condition requires. The sales agent position for Terminex although permitting frequent change of positions is a light position requiring under DOT regulation stand/walking up to 6 hours per day and would according to Vinson's credible testimony involve crawling which Dr. Schnitzer restricted Claimant from doing. The assembler position is light work again requiring primarily standing and walking and does not address any of Claimant's postural limitations. The telemarketer is a sedentary position requiring frequent sitting (up to 2/3 of a day) not allowing for needed alternation of position and also does not address Claimant's postural limitations.. The gate guard and parking lot positions are light jobs and do not address Claimant's postural limitations. The surveillance system monitor is a sedentary position and also does not address Claimant's postural limitations. In addition, although some of list jobs allow frequent change of positions, none specify or allow the change of positions required by Claimant. Indeed, Anderson never

inquired when checking these positions to see if they would accommodate a person with Claimant's restrictions.

Employer thus failed to establish SAE as of February 15, 2001 when Dr. Schnitzer "approved the jobs provided by Anderson. If Employer failed to establish SAE as of February 15, 2001, this question remains, did it do so on Sept 5, 1997 or any time thereafter prior to February 15, 2001? The FCE of August 26, 27, 1997 limits Claimant to lifting of 15 pounds infrequently (8 to10 times per day) and 10 pounds frequently. Claimant was also noted to have difficulty with squatting, stooping, kneeling, climbing and walking on uneven surfaces with a need to alternate positions at will. On June 19, 1999, Dr. Schnitzer estimated that Claimant could sit up to 30 minutes after which he needed a 5 minute break. (EX-C p. 52). On February 14, 2000, Dr. Schnitzer limited Claimant to up to 6 hours per day but less than 1 hour in duration with no more than 2 hour standing/walking, frequent lifting of 20 pounds, occasional squatting, crawling climbing with frequent bending and reaching, no exposure to unprotected heights and moderate restrictions on being around moving machinery. More significantly Dr, Schnitzer opined that pain was present to such a degree as to significantly interfere with activities of daily living and work requiring Claimant to take unscheduled 15 breaks every 1 to 2 hours and cause Claimant to miss about two days of work per month.

Clearly under the February 14, 2000 assessment Claimant could perform no work.

Under the earlier assessments Claimant may have been able to work. However, none of the jobs listed as available since September 5, 1997 address the postural let alone Claimant's exertional limitations.

In reviewing the entire record and considering Claimant's credible pain complaints, I find that the most accurate assessment of Claimant's work limitations was provided by Dr. Schnitzer on February 14, 2000 in combination with Claimant admission that he can sit, stand/ or walk up to 30 minute intervals. As such, I find Claimant has not been able to do any work since his injury, and thus, is entitled to PTD from September 5, 1997 to present and continuing.

D. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724(1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961(1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et. al., 16 BRBS 267(1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* Grant v. Portland Stevedoring Company, et al., 17 BRBS 20(1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

E. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee

in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from September 5, 1997 to present and continuing based on a stipulated average weekly wage of $ $490.00 with a correspondent compensation rate of $356.68.

2. Employer shall be entitled to a credit for all compensation paid to Claimant from September 5, 1997 to present.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A
CLEMENT J. KENNINGTON
Administrative Law Judge